Canadian Environmental Law Association
L'Association canadienne du droit de l'environnement

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Ms. Susan Dunn
Board Secretary
Environmental Appeal Board
Suite 502
112 St. Clair Ave. West
Toronto, Ontario
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via fax

Dear Ms. Dunn:

Re: Environmental Appeal Board Draft Rules of Practice

Thank you for providing the Canadian Environmental Law Association with an opportunity to comment on the above matter. We have reviewed the Draft Rules of Practice and are generally in favour of the document and believe it will ensure the process before the Board is fair, open and understandable. However, we also have concerns about the following Rules:

1. Rule 14.2 (1) Request for Review

a) We are concerned about the restriction placed on the right to request a review under Rule 14.2(1). It is not clear why a threshold review should require approval of the Director and at least one party whose position or interest is opposed, or the applicant and at least one party whose position or interest is opposed. We believe this restriction is not in the public interest for the following reasons:

i) Rule 14.2(1) fails to recognize that a party at a hearing, whose interest may be opposed to both the Director and the applicant, may have legitimate grounds for requesting a review. However, the party will often not be in a position to obtain the support from the applicant or the Director to do so. For example, persons who are impacted by pollution and/or public interest groups will often seek party status at a hearing. They may consider the measures taken by the Ministry of Environment and Energy (MOEE) to be inadequate and they will usually be opposed to the position of both the MOEE and the applicant. If such a party wanted to request a review s/he could not do so under Rule 14.2(1), regardless of the merits of the request for review, unless s/he could convince the applicant or the Director to raise it before the Board. This requirement may be difficult, if

not impossible, for a party to satisfy.

ii) All parties have the right to call summon witnesses, conduct examinations-in-chief and cross-examinations. All parties have the right to appeal the Board's decision under sections 144(2) and 144(3) of the *Environmental Protection Act*. Fairness dictates that since a party to a hearing has the same rights as an applicant and the Director in these important procedural matters, s/he should have the same rights to request a review. Under Rule 14.2(1) a party could not initiate a right of review even if the party receives support from another party to the proceeding, who was not the applicant or the Director. Consequently, the restriction placed under Rule 14.2(1) may result in unfairness to some parties and it will also deny the Board of the benefit of reviewing its decision if there is a genuine need to do so.

iii) One of the benefits of requesting a right of review is that it allows a party to avoid the costs associated with bringing a judicial review application. This is a significant benefit for low income persons and public interest groups who are not always in a position to exercise their appeal rights because of costs considerations. We, therefore, urge the Board not to place any unnecessary restrictions on this important right.

There does not appear to be any valid reason to restrict the right to request a review to the Director or an applicant with the support of one other party whose interest in the proceeding is opposed. The only rationale for this restriction may be a concern about the potential for parties to abuse this right when they are not satisfied with the Board's decision. The Board could, therefore, be faced with numerous requests for review which have little or no merit. This could have substantial resource implications for the Board as well as other parties. It is premature, however, to speculate whether parties will frequently resort to this right, given the requirements that must be met under Rule 14.4, the time constraints under Rule 14.3 and the factors which may be considered by the Board for a threshold review, under Rule 14.5.

However, even if a right to request a review is being abused by a party, the Board can simply refuse the request pursuant to Rule 14.10 without requesting submissions from other parties. In view of the Board's power to summarily dismiss requests for review, it seems unnecessary for the Board to place stringent requirements for the right to request a review.

Therefore, we recommend that Rule 14. 2(1) be amended to state that:

> **Any party to the proceeding may request a review of the final decision or order.**

We would recommend the Board give consideration to extending the right to request a review to interlocutory decisions or orders because it may have as much significance for a person as a

final decision or order. For example, an unrepresented party may approach the board and request party status, but be unable to fully articulate the reasons why party status should be granted. If the Board denies this request, the person may seek advice from counsel who may be able to provide compelling reasons based on facts and law as to why party status should be granted. Unless the right of review is provided for interlocutory decisions, the person will be deprived from participating in the proceeding. This denial of a fundamental right may cause significant prejudice to a person. Therefore, it would be in the public interest to broaden the right of review to interlocutory decisions or orders.

We also recommend the Board consider extending the right of review to decisions on application for leave under the *Environmental Bill of Rights (EBR)*. In addition, we recommend the Board consider extending the right of review to interlocutory decisions or orders and final decisions and orders under the *EBR*. This would ensure that rules governing proceedings before the Board under the *EBR* are consistent with the rules governing proceedings under other environmental legislation.

2. Part XV Rules for Applications for leave to appeal under section 38 of the Environmental Bill of Rights, 1993

A number of our concerns with respect to the applications for leave to appeal were already addressed in our letter to you dated May 2, 1995. We have a number of additional concerns with the rules governing the *EBR* process.

a) Rule 15.5 states that it is not necessary that written evidence be given under oath or provided in the form of an affidavit. However, a person submitting the evidence shall state in writing that he or she affirms that all the evidence submitted and all statements made in the application are true and shall sign the statement. The distinction between an affidavit and an affirmation that the written evidence is true is an extremely narrow one, at best. In essence, the Board's requirement to have applicants affirm that all the written evidence is true is tantamount to imposing the requirement to swear an affidavit.

   Individuals who are providing written evidence will frequently rely on expert reports, data, journals and other types of information and will not be in a position to positively verify the accuracy of such documents, since most of this information will be the opinions of third parties. The accuracy and weight of such evidence can only be determined in the proceedings when *viva voce* evidence is presented at the hearing. We, therefore, request the Board amend Rule 15.5 to state:

   > Written evidence upon which any of the participants in an application of leave intend to rely need not be given under oath or provided in the form of an affidavit unless the Board orders this.

b) Rule 15.5 states that the Board may direct that the witnesses be cross-examined where the written evidence reveals factual disputes or raises questions in regard to the credibility of witnesses. Although, we support this provision, generally, the parties may be in a better position than the Board to make a determination at the application stage about the factual matters in dispute. We therefore, request that the Board amend Rule 15.5 to allow the the Board upon its own initiative or upon the request of a party to allow the cross-examination of witnesses. Rule 15.5 should, therefore, be amended to state:

> Where the written evidence reveals factual disputes or raises questions in regard to the credibility of witnesses, the Board on its own initiative or upon the request of a party may order that witnesses be cross-examined on their evidence, following the procedure in sub-Rule 5.5 with any necessary changes.

c) There should be a written procedure governing the right of reply. In the *Rules of Civil Procedure* on applications as well as motions, the applicant has the right of reply. It seems only fair that this right be provided on applications for leave under the *EBR*, as opposed to leaving it to the discretion of the Board. The difficulty with leaving it to the Board's discretion is that counsel and unrepresented applicants are currently faced with attempting to guess how the Board will exercise its discretion, and prepare accordingly. By providing the right of reply in the Draft Rules of Procedure, the Board will be injecting an element of predicability in applications for leave.

d) Rule 15.6 (2) states that if the material is more than twelve pages long sub-Rule 3.2(1) (a) applies. Sub-Rule 3.2(1)(a) requires personal delivery of a document. There is no valid reason to require that a document more than twelve pages be delivered only by personal delivery. We assume that the Board meant sub-Rule 3.2(1)(d) to apply.

e) Rule 15.8 allows the Director or the instrument holder to obtain an extension of time to file their response. The way the section is worded it provides an automatic right to these parties to obtain an extension. It is not clear why the Director or the instrument holder should automatically be granted an extension of time, when the applicant is given only fifteen days to file an application for leave to appeal under section 40 of the *EBR*.

We recognize that in some cases the Director or the instrument holder may require an extension of time, given the complexity of the issue or other extenuating circumstances. It would be more appropriate for the Board to require the Director and the instrument holder to file a response within fifteen days, unless unusual circumstances warrant otherwise.

It is also not clear why Rule 15.8 stipulates the applicant shall request consent to file later and notify the Board and all other parties of the unusual circumstances that require the Board to make a decision more than thirty days after the application was filed. Rule 15.8 should impose this requirement on the party who requested the extension to file a response, which would be either

the Director or the instrument holder. We recommend Rule 15.8 be amended to state:

> If the Director or the instrument holder intends to respond more than 15 days after the application has been filed, the Director or the instrument holder shall notify the Board of the reasons for the request and if the Board grants an extension of time, this will be deemed impossible for the Board to make its decision within 30 days after the application was filed, and the person requesting the extension shall:
>
> (1) request the Board's consent to file later, and
>
> (2) notify the Board, and all other parties of the unusual circumstances that require the Board to make its decision more than 30 days after the application was filed.

We recognize if an extension for time to file a response is provided and a right of reply is also provided to the applicant, it will give the Board very little time give its decision within the thirty day deadline. Since this is likely to be a frequent problem it may be appropriate for the Board to raise this issue with the Environmental Commissioner's office to attempt to resolve this difficulty.

The Draft Rules of Practice raise a number of important procedural rights governing proceedings before the Board. It may be beneficial, to have a meeting with representatives from the MOEE's Legal Services Branch, lawyers who represent instrument holders and non-governmental organizations to discuss these rules to ensure that all issues have been fully canvassed prior to implementation.

Yours truly,

CANADIAN ENVIRONMENTAL LAW ASSOCIATION

Ramani Nadarajah
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Paul Muldoon
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282.	Letter to Brian Ward, Director of Eastern Region, Ministry of Environment and Energy. Re MOEE's Environmental Planning Program: Land Use Planning Program Review (EBR Registry Number PA6E0002.P). K. Cooper, February 1996	$ 1.00
283.	It's Still About Your Health. A submission on CEPA Review: The Government Response Environmental Protection Legislation Designed for the Future - A Renewed CEPA - A Proposal. CELA and CIELAP, March 1996	
284.	Letter to the Hon. A. Leach, Minister of Municipal Affairs and Housing; Meredith Beresford - Provincial Planning Policy Branch, Ministry of Municipal Affairs and Housing; Philip McKinstry - Policy Statement Review, Ministry of Municipal Affairs and Housing. Comments Regarding Proposed Provincial Policy Statement. K. Cooper, March 1996	$ 1.00
285.	Deregulation and Self-Regulation in Administrative Law: A Public Interest Perspective. Prepared for a workshop on Deregulation, Self-Regulation and Compliance in Administrative Law. M. Swenarchuk, P. Muldoon, March 1996	$ 2.55
286.	Letter to Susan Dunn - Board Secretary of the Environmental Appeal Board. Re: Environmental Appeal Board Draft Rules of Practice. R. Nadarajah and P. Muldoon, March 1996	$ 1.00